# STATE OF MICHIGAN

# COURT OF APPEALS

SAMUEL R. CARD, II,

Plaintiff-Appellant,

v

CITY OF HIGHLAND PARK, J. LANT, R. HART, F. GEORGE, J. CZARNECKI, AND DAVID SIMMONS,

Defendants-Appellees.

UNPUBLISHED
June 10, 2003

No. 230449
Wayne Circuit Court
LC No. 98-818406-NO

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of directed verdict in defendants' favor. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

This case arises out of the July 26, 1997 arrest of plaintiff by Highland Park police officers. Following a "nuisance and abatement operation," officers arrested plaintiff for solicitation and resisting arrest. During the arrest, plaintiff received multiple facial fractures. Plaintiff was acquitted of the charges at his criminal trial and subsequently brought this civil action against the city and individual officers alleging a violation of his civil rights pursuant to 42 USC 1983, false arrest, false imprisonment, assault and battery, intentional infliction of emotional distress, defamation, malicious prosecution, and abuse of process.

Following the conclusion of plaintiff's proofs at trial, defendants moved for directed verdict on all claims against all defendants. With very little analysis, the trial court ruled that plaintiff "did what they said he did," and granted directed verdict with regard to all defendants.

When deciding whether to grant a motion for directed verdict, the trial court must view the testimony and all legitimate inferences from the testimony in the light most favorable to the nonmoving party to determine whether a prima facie case was established. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). When the evidence could lead reasonable jurors to disagree, the court cannot substitute its judgment for that of the jury. *Tobin v Providence Hosp*, 244 Mich App 626, 652; 624 NW2d 548 (2001). The trial court's decision on the motion is reviewed de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). This Court views all the evidence presented to determine whether a question of fact

existed, viewing all evidence in the light most favorable to the nonmoving party, granting him every reasonable inference and resolving any conflict in the evidence in his favor. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). Further, this Court must recognize the unique opportunity of the jury and the trial judge to observe witnesses and the factfinder's responsibility to determine the credibility and weight of the testimony. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

At the outset, we note plaintiff's claim regarding the trial court's pretrial ruling that no verdict could be imposed against the individual officers and that the city was liable on the theory of vicarious liability. The parties agree that this ruling was erroneous. Because under 42 USC 1983, no respondeat superior liability is permitted, *Payton v Detroit*, 211 Mich App 375, 398; 536 NW2d 233 (1996), we agree that the trial court erred with regard to this ruling.

## I. INTENTIONAL TORT CLAIMS AGAINST DEFENDANT OFFICERS

On appeal, plaintiff argues that the trial court improperly determined, as a matter of law, that plaintiff's arrest was proper, and thus, improperly granted directed verdict with regard to the intentional tort claims.

### A. FALSE ARREST

To prevail on a claim of false arrest, a plaintiff must show that the arrest was not legal, i.e., that the arrest was made without probable cause. *Blasé v Appicelli*, 195 Mich App 174, 177; 489 NW2d 129 (1992). Probable cause to arrest without a warrant exists when the facts and circumstances within the officer's knowledge at the time of the arrest are sufficient to warrant a prudent person, or one of reasonable caution, to believe that the suspect has or is committing a crime. *Tope v Howe*, 179 Mich App 91, 102; 445 NW2d 452 (1989). Mere suspicion is insufficient, the facts must create an actual belief in the mind of the arresting officer. *Id*.

At the time of plaintiff's arrest, in Michigan, a police officer was authorized to make a warrantless arrest for a misdemeanor that was committed in his presence. MCL 764.15(1)(a).[1] However, in *People v Dixon*, 392 Mich 691; 222 NW2d 749 (1974), the Supreme Court adopted what is known as the "police team" theory, which allows for police officers without a warrant to arrest for a misdemeanor based on information supplied by other officers. See *People v Palma*, 111 Mich App 684, 689; 315 NW2d 182 (1981). The Court in *Dixon* reasoned:

> Whatever may have been its historical origins, we perceive the principal present day importance of the presence requirement to be that a police officer may not utilize information received from third persons as a basis for a warrantless misdemeanor arrest. When the basis of the officer's belief that the defendant has committed a misdemeanor is information imparted to him by, say, victims, witnesses or informers, he must present the evidence to a magistrate and seek an

[1] MCL 764.15 was amended in 2000 to allow for an arrest for a misdemeanor punishable for more than 92 days based on reasonable cause.

arrest warrant. He may not act on his own appraisal of the reasonableness of the information.

> Another police officer is not a third person within that policy. Courts in other jurisdictions have developed a "police team" qualification of the presence requirement, permitting officers who are working together on a case to combine their collective perceptions so that if the composite otherwise satisfies the presence requirement that requirement is deemed satisfied although the arresting officer does not himself witness all the elements of the offense. [*Dixon, supra* at 697-698.]

Plaintiff primarily argues that because the arresting officers in this case did not see the misdemeanor take place, plaintiff's arrest was invalid. However, the defendant officers testified that on the night in question, they were conducting a "nuisance and abatement operation" aimed at ridding the city of prostitution. Officer Felicia George testified that, as part of the operation, she acted as the decoy and that defendant drove up to her and offered her $15 to perform a sex act. She also testified that she told defendant to drive to the local motel and then gave the surveillance and cover team the signal that an offer had been made. Officers James Lant and Rodney Hart testified that they were acting as the "take down" unit during the operation.[2] Both officers testified that they received the information of the incident over the police radio and then proceeded to stop plaintiff's vehicle. Specifically, Officer Lant testified that after they passed the target area, they received a description of the vehicle, the Michigan registration plate, the color of the vehicle and the fact that a black male occupied it. Officer Jeffrey Czarnecki, who assisted with the arrest, testified that he heard the call go out to the "take down" unit.

Although the testimony conflicted with regard to who made the call to the arresting officers and there was some discrepancy with regard to the description, it is undisputed that the officers received the call from an officer through the police radio describing what they believed to be plaintiff's vehicle. The operation, which consisted of all officers relaying information to one another of the incident, satisfies the "police team theory." Therefore, because the arresting officers made the arrest pursuant to information they received from other officers involved in the operation, the arresting officers had probable cause to arrest plaintiff. Therefore, plaintiff's arrest was valid.

### B. DEFAMATION, MALICIOUS PROSECUTION, and ABUSE OF PROCESS

With regard to plaintiff's intentional tort claims of defamation, malicious prosecution and abuse of process, plaintiff provided very little support for these claims on appeal; therefore, we decline to address them at any length. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). However, we find that because the arresting officers had probable cause to

[2] Testimony established that as part of this operation, one officer worked as the decoy, several officers were located near the decoy acting as surveillance and cover units for protection, and several officers worked as "take down" units who actually pursued and arrested the suspects.

arrest plaintiff, his claims for defamation, malicious prosecution, and abuse of process are without merit.[3]

## C. ASSAULT AND BATTERY

Although plaintiff's arrest was valid, we find merit to plaintiff's contention that the trial court erred in directing verdict regarding plaintiff's assault and battery claim. An assault is "any intentional unlawful offer of corporal injury to another person by force or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998), quoting *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). A battery is "the willful and harmful or offensive touching of another person which results from an act intended to cause such contact." *Id*. A police officer effecting a lawful arrest may use reasonable force if the arrestee resists. *Tope*, *supra* at 106. To determine whether the force used by officers to effectuate an arrest is objectively reasonable under the Fourth Amendment, the totality of the circumstances must be considered from the viewpoint of a reasonable officer. *Graham v MS Connor*, 490 US 386, 394; 109 S Ct 1865, 1870-1871; 104 L Ed 2d 443 (1989).

Officers Hart and Lant testified that when they stopped plaintiff's vehicle, plaintiff questioned why he was being stopped and Officer Lant informed him that he was being arrested for solicitation. Both officers testified that plaintiff remained calm until one handcuff was placed on him and then he "exploded." According to the officers, neither of them could subdue plaintiff so Officer Lant used chemical spray. The officers were forced to call for assistance, to which Officer Czarnecki responded. According to Officer Czarnecki, when he arrived, he saw Officer Hart "facing off" with plaintiff, so he responded by tackling plaintiff to the ground.

Plaintiff testified to a completely different version of events. According to plaintiff, although he questioned why he was being stopped, he never attempted to resist arrest. Plaintiff claimed that after he got out of his car and was handcuffed, Officer Lant repeatedly asked him if he was resisting arrest. When plaintiff answered in the negative, Officer Lant started spraying plaintiff with chemical spray. On the third spray, plaintiff fell to the ground and Officer Lant then threw him up against the car and Officer Hart put him in a headlock and started hitting him in the head. According to plaintiff, the officers continuously jumped on him and kicked him and then a third officer jumped in and started punching him.

Viewing the evidence in the light most favorable to plaintiff, we are unable to conclude that the trial court properly directed verdict for defendants Lant, Hart and Czarnecki on the claim of assault and battery. During the arrest, plaintiff received multiple severe facial fractures and a significant amount of chemical spray was used.[4] Although the arrest was valid, the testimony

[3] In his complaint, plaintiff also asserted claims of false imprisonment and intentional infliction of emotional distress; however, plaintiff failed to raise these claims on appeal.

[4] Evidence established that plaintiff received a broken nose, an orbital bone fracture, and a closed head injury.

greatly conflicts with regard to whether the amount of force effectuated by the officers was necessary. Disputed issues of fact and the assessment of the credibility of witnesses are properly within the province of the jury to determine. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998); *Anton v State Farm Mu Auto Ins Co*, 238 Mich App 673, 689; 607 NW2d 123 (1999). In sum, there were disputed issues of fact regarding the circumstances surrounding the seizure, the necessity for the use of force, and the type and amount of force used. The evidence at trial, when viewed in the light most favorable to plaintiff, warranted the assault and battery claim to go to the jury.

## II. 42 USC 1983

On appeal, plaintiff also contends that the trial court erred in directing verdict with regard to his constitutional rights claims brought under 42 USC 1983.

### A. MUNICIPAL LIABILITY

42 USC 1983 provides a federal remedy against any person who, under color of state law, deprives another of rights protected by the constitution or laws of the United States. *Payton v Detroit*, 211 Mich App 375, 398; 536 NW2d 233 (1996), citing *Monell v Dep't of Social Services of New York*, 436 US 658, 690-691; 98 S Ct 2018; 56 L Ed 2d 611 (1978). A municipality can be held liable under § 1983 for its policies that violate the constitution of the United States; however no respondeat superior liability is permitted. *Id*. A municipality cannot be held liable under § 1983 solely because it employs a tortfeasor. *Payton*, *supra*, citing *Mudge v Macomb Co*, 210 Mich App 436, 446; 534 NW2d 539 (1995). To sustain a cause of action against a municipality, a plaintiff must show that an "action pursuant to official municipal policy of some nature caused a constitutional tort." *Payton*, *supra* at 398. The policy or custom must originate with the decisionmaker who has final policymaking authority with respect to the omission or commission at issue. *Sudul v City of Hamtramck*, 221 Mich App 455, 498; 562 NW2d 478 (1997), citing *Pembaur v Cincinnati*, 475 US 469, 482; 106 S Ct 1292; 89 L Ed 2d 452 (1986). Decisions made by officials with final policymaking power – i.e., the police chief – are attributable to the governmental entity. *Id*. A policy of inaction must reflect some degree of fault before it can be considered a policy for which § 1983 liability can be based. *Sudul*, *supra* at 499. The alleged policy or custom must be the "moving force" of the constitutional violation to establish liability against the government entity. *Id*.

In his complaint, plaintiff brought several allegations against the city under § 1983 including the failure to train officers, the failure to investigate, and the failure to get plaintiff the necessary medical attention. On appeal, plaintiff primarily claims the police chief failed to properly investigate the incident and suggests that it was the city's policy to wait until a person had bonded out of jail to get the person medical attention; thus, depriving plaintiff of the proper medical treatment.

A finding of liability on the part of the city under § 1983 requires a showing that the police chief displayed deliberate indifference as a matter of custom or policy by failing to investigate whether any police officer battered or used excessive force against plaintiff. See *Sudul*, *supra*. A § 1983 claim can be maintained if it is the custom, policy or practice of the police chief to engage in ostrich-like behavior regarding constitutional rights violations. *Id*. at 465.

Here, although it is apparent that a full investigation into plaintiff's incident was not conducted, plaintiff has failed to produce evidence that the police chief acted completely indifferent or that it was the custom or policy of the police department to deliberately act indifferent to complaints such as plaintiff's. Chief Ronald Parham, who was an inspector at the time of the incident, testified that he learned of the incident from another officer who informed him that a "john" had received a bloody nose while being arrested during the operation. Chief Parham testified that he requested paperwork be filled out regarding the matter and asked the desk sergeant to prepare reports regarding the incident. Chief Parham acknowledged that he did not receive all the requested reports and he did not reprimand any of the officers. However, it was acknowledged that an initial report regarding the injury, a summary of the incident and a report regarding the use of chemical agent were all prepared in the matter. Although it appears the investigation was not followed up on accordingly, there is no evidence that this was deliberate or that this was the policy of the department.

Plaintiff also failed to produce evidence that it was the policy of the city to not provide necessary medical treatment to arrestees. Under the circumstances, plaintiff failed to produce evidence rising to the level of complete indifference on the part of the police chief and city toward plaintiff's constitutional rights. The record does not reflect a custom or policy of deliberately indifferent supervision and discipline that proximately caused the use of excessive force against plaintiff or the lack of investigation in the matter. We find that under the circumstances, plaintiff's § 1983 claim against the city failed and the trial court properly directed verdict in the city's favor.

## B. EXCESSIVE FORCE CLAIMS

It appears plaintiff also brought claims under § 1983 against the individual officers for excessive force used in his arrest in violation of the Fourth Amendment. Ordinarily, in actions brought under § 1983, government officials, including police officers, performing discretionary functions may be entitled to qualified immunity if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Thomas*, *supra* at 644. Here, the defendant officers have not argued that they are immune from liability, but instead argue that their conduct was reasonable. However, the reasonableness of the conduct in which immunity depends is a factual question that the factfinder must determine. *Alexander v Riccinto*, 192 Mich App 65, 72-73; 481 NW2d 6 (1991).

To determine whether the force used to effect an arrest is "reasonable" under the Fourth Amendment, this Court must consider the totality of the circumstances surrounding the seizure including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, *supra* at 394. An objective standard must be implemented to determine the reasonableness of the particular force used in light of the facts and circumstances confronting a reasonable officer on the scene. *Id*. at 396-397; see also *People v Hana*, 459 Mich 1005; 595 NW2d 827 (1999).

As with the assault and battery claim, whether defendants Hart, Lant and Czarnecki used excessive force in effectuating plaintiff's arrest should have gone to the jury. The defendant officers claim that the level of force used was necessary; however, plaintiff received considerable

injuries and claims he did not resist arrest. Under the circumstances, it was inappropriate for the trial court to substitute its judgment for that of the jury.

## III. EVIDENTIARY ISSUES

On appeal, plaintiff also raises several evidentiary issues. The decision whether to admit evidence is within the discretion of the trial court and should not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac*, 457 Mich 593, 613-614; 580 NW2d 817 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling made, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Barrett v Kirtland Comm College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

Generally, all relevant evidence is admissible. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Dep't of Transporation v Van Elslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). However, even if relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. MRE 403. Assessing the probative value against prejudicial effect requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion, and whether the fact can be proved another way with fewer harmful collateral effects. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995).

### A. FREEZE PLUS P VIDEO

Plaintiff sought to introduce a Freeze Plus P video to show the effect of the Freeze Plus P on plaintiff and what medical attention should have been given.[5] However, the tape was not shown to the court before trial and the court did not want to delay trial any further by having to watch the tape before playing it to the jury. At trial, both the officers and plaintiff testified regarding what effect the spray had on them. Under the circumstances, the court did not abuse its discretion by refusing to allow the tape at this trial.

### B. MEDICAL RECORDS

[5] Freeze Plus P is the chemical spray used by the arresting officers during plaintiff's arrest. The video plaintiff sought to introduce was a training video that illustrated the effects of the spray on an individual.

Plaintiff argues that medical records concerning years after the incident are inadmissible. Plaintiff primarily argues that the trial court erred in admitting the records because they were prejudicial and admitted after the close of discovery and without plaintiff's authorization.

Plaintiff opened the door to inquiry regarding his mental state by asserting that he suffered mental harm as a result of the incident. Plaintiff discussed the fact that he had been hospitalized on previous occasions for depression and other behavioral problems. There is no evidence that the fact that the records were admitted after discovery had closed and were apparently obtained without plaintiff's authorization made the records more prejudicial. Under the circumstances, because plaintiff's conduct and mental condition was at issue throughout trial, the records contained probative information that was not outweighed by prejudice.

### C. CITY'S FINANCIAL STATUS

With regard to the city's financial status, plaintiff gives no support for his claim that testimony regarding the city's financial motivations should have been admitted. Because plaintiff failed to sufficiently brief this argument, this Court will not address it. See *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000).

## IV. CONCLUSION

In conclusion, we affirm the trial court's order of directed verdict in all respects except with regard to the assault and battery and § 1983 excessive force claims against the individual arresting officers, defendants Hart, Lant and Czarnecki. We remand for a new trial with respect to these claims against defendants Hart, Lant and Czarnecki only.

Affirmed in part and reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Hilda R. Gage